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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 956

LARRY D. HIBLER AND JUANITA HIBLER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

REFERENCE TO LOWER COURT REPORTS

The per curiam opinion of the Court of Appeals for the Fifth Circuit is reported in .... F. 2d ....

The opinion of the Tax Court is reported in 46 T. C. 633.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The date of the judgment sought to be reviewed, and the date of its entry, is November 2, 1967.

2. Jurisdiction to review the judgment in question is conferred by Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether in the sale of an insurance expiration list there was such a reservation by the seller as to cause a part of the post-sale income therefrom to be taxed to the seller and not to the buyer.

STATUTORY PROVISION

The only statutory provision involved is Subsection 61(a) of the Internal Revenue Code of 1954 (also Subsection 61(a) of Title 26 of the United States Code). It reads in pertinent part as follows:

> "(a) General definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> (2) Gross income derived from business;"

STATEMENT OF THE CASE

All facts were stiplated. Summarized, the material facts are as follows:

On January 24, 1962, Walker sold to Hibler the expiration list and certain tangible personalty used in his fire, casualty and fidelity insurance agency. Two documents were executed, a contract and a bill of sale. (These docu-

ments are set out in the opinion of the Tax Court appended.) The bill of sale recited a consideration of $20,000.00 cash and a reservation of 50% of the commissions upon renewal of policies in the expiration list until such 50% totaled $70,000.00. The contract repeatedly and consistently referred to the 50% of commissions as having been reserved from the sale. It provided that Hibler would serve as a trustee in receiving and remitting Walker's share to Standard Accident Insurance Company for Walker's benefit. Hibler's only obligations were to exercise reasonable diligence to renew the policies on the expiration list and to use reasonable efforts to prevent the loss of business and to remit the proceeds of the interest reserved by Walker. Hibler could not sell without the consent of Walker and Standard. Aside from the above obligations Hibler was not liable for the payment of the $70,000.00. Walker had no right to repossess or sell the assets so conveyed unless Hibler defaulted in the performance of the above obligations.

Both documents were prepared by an attorney for Standard. Hibler was not represented in the transaction by any attorney.

Hibler's post-sale services were necessary to produce revenue from the expiration list.

The 50% commissions paid to Walker pursuant to the above documents amounted to $6,196.49 in 1962 and $5,226.50 in 1963. Hibler did not pay income tax on these amounts.

The respondent determined that Hibler should have paid tax on these amounts. The Tax Court sustained the re-

spondent, and the Fifth Circuit Court of Appeals affirmed the Tax Court per curiam.

BASIS FOR TAX COURT'S JURISDICTION

Jurisdiction was conferred upon the Tax Court by sections 7442 and 6213 of the Internal Revenue Code of 1954 (section 7442 and 6213 of Title 26 of the United States Code).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Tax Court, as affirmed per curiam by the Fifth Circuit, has decided a federal question in a way in conflict with applicable decisions of this Court. The issue involved is of national interest and importance.

The issue in the case essentially is whether one who sells a non-depletable asset and reserves from the sale a portion of the post-sale income therefrom is taxable on such income, or whether the buyer is taxable thereon.

This precise issue, as it applies to minerals, was presented to the Supreme Court in *Thomas v. Perkins*, 301 U.S. 655 (1937). There A conveyed undeveloped leases to taxpayer for cash and reserved $395,000 to be paid only out of one-fourth of oil if, as and when produced. Oil could be produced only through the development and operational activities of taxpayer or his transferees. The Court held taxpayer could exclude such one-fourth from his income.

Based upon such case, the Internal Revenue Service has long issued rulings to similar purchasers of mineral interests.

T.L.R. 338, (September 15, 1961), 1961 Prentice-Hall Federal Taxes ¶54,908.

The lower courts have refused to apply *Thomas v. Perkins* to the case at hand solely because the former dealt with depletable natural resources.

The treating of the income of depletable assets differently from that of non-depletable assets is in conflict with applicable decisions of this Court. *Stratton's Independence v. Howbert*, 231 U.S. 399 (1913), holding that the production and sale of minerals was not a mere conversion of capital from one form to another, but was an income producing operation similar to manufacturing; *Burnet v. Harmel*, 287 U.S. 103 (1932), and *Anderson v. Helvering*, 310 U.S. 404 (1940) stating that mining operations resemble a manufacturing business carried on by the use of the soil; *Burton-Sutton Oil Co. v. Commissioner*, 328 U.S. 25 (1946), stating that royalty payments under mineral leases are income to the lessor, like payments of rent; and *Commissioner v. Brown*, 380 U.S. 563 (1965), stating that extracting natural resources is viewed as an income-producing operation and not as a conversion of capital investment.

The decision of this Court in *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260 (1958), illustrates that the same rules of income recognition apply to minerals as to non-minerals. The lower courts had unanimously relied on the well established mineral doctrines of economic interest and oil in place to confer capital gains treatment on an oil payment carve out. This Court reversed by unanimous decision.

The lower courts in this case justified their distinction between minerals and non-minerals on this Court's distinction of *Thomas v. Perkins* in the case of *Commissioner v. Brown, supra. Commissioner v. Brown* is not in point.[1]

This case represents, we believe, the first attempt by any court to limit *Thomas v. Perkins* to minerals. Other courts have at least assumed that it was not so limited.[2] Clearly if it were not so limited, the seller would have effectively reserved income in the instant case. The documents in this case could hardly more clearly have expressed the intent of the parties that the seller reserve income.

The issue in this case is unquestionably of national interest.[3]

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[1] The issue there was whether there was a sale. The question of whether there was a reservation was not involved. Cf. *U.S. v. Witte*, 306 F. 2d 81 (5th Cir. 1962). *Brown* first distinguished *Perkins* because of the policy of the tax law to allow the taxpayer to realize on appreciated values at capital gains rates. Such distinction had no relation to whether minerals were involved in *Perkins* or not. *Brown* simply did not involve a reservation from an admitted sale. The "peculiar character" of minerals, mentioned in *Brown*, has been recognized only for the purpose of allowing a deduction for depletion. *Brown* next distinguished *Perkins* by pointing out the limitation on *Perkins* announced by *Anderson v. Helvering, supra.* The *Anderson v. Helvering* limitation obviously applied in *Brown.* On the contrary, such limitation does not apply to the instant case. Since Hibler's only obligation was to use his best efforts and to remit Walker's portion, as a matter of substance Walker had to look solely to production under the expiration list for the satisfaction of his reserved interest. (By way of comparison, the possibility of receiving compensation for damages for breach of the universal covenant to reasonably develop in an oil and gas lease has never brought the *Anderson v. Helvering* limitation into force.)

[2] *Vermont Transit Co. v. Commissioner*, 218 F. 2d 468 at 469 (2d Cir. 1955), cert. den. 349 U. S. 945 (1955); McCulley Ashlock, 18 T. C. 405 at 412 (1952); *Alstores Realty Corporation*, 46 T. C. 363 at 372 (1966).

[3] The same Tax Court judge who decided *Hibler* subsequently thereto handed down the decision in *Olin Bryant*, 46 T. C. 848 (1966), now on appeal to the Fifth Circuit. Such case involved the same issue and the court cited and followed its own holding in *Hibler.*

(Footnote Continued on Following Page)

It is common knowledge, *T. I. R. 338, supra,* that the Internal Revenue Service issues rulings applying the reservation of income principles of *Thomas v. Perkins* to minerals. Undoubtedly these approved transactions, both in number

(Footnote Continued From Preceding Page)

Counsel herein (who also represents the taxpayers in *Bryant*) has received inquiries upon this issue from New York, California, Pennsylvania and Texas. The *Bryant* case has been specially commented upon in a nation wide tax service ("Non-Depletable Property Doesn't Qualify for Tax Treatment Accorded ABC Transaction", Report Bulletin No. 5. ¶ 105.2, P-H Oil and Gas Taxes, 11-22-66, emphasizing that mineral income is to be accorded different treatment) and in a leading tax institute (Ginsburg, "Dividing Income and Capital Appreciation Among Family Members," 25 N.Y.U. Inst. on Fed. Tax 671-673 [1967]) and in the Bulletin of the Section of Taxation, American Bar Association, Vol. XX, No. 4 (July, 1967), pp. 144 and 262.

Hibler and *Bryant* have both been discussed by a leading tax panel. "The Present Situs of the Border Line Between Capital, Ordinary, and Nontaxable Gains and Losses: A Panel Discussion," 25 N.Y.U. Inst. on Fed. Tax 613 at 636-638 (1967).

The issue has also been the subject of Congressional debate. The following is quoted from footnote 7 of the Tax Court's opinion in *Olin Bryant*:

> "See also the recent remarks by Senator Gore of Tennessee where, in resisting the issuance of a favorable revenue ruling involving an ABC acquisition of depletable mineral interests other than oil and gas, he referred to the 'notorious ABC scheme' which is 'a sophisticated tax gimmick.' See 113 Cong. Rec. 12080-12083 (June 8, 1966), 18146-18147 (Aug. 11, 1966), 18685 (Aug. 16, 1966). 'Heretofore, the ABC transaction has been largely confined to oil and gas, which are, of course, favored industries. But I see no reason to compound inequity by allowing the ABC transaction to spread to other industries. * * * The ABC transaction is a tax dodge, pure and simple. Taxation is the principal reason for setting it up,' 112 Cong. Rec. 12081 (June 8, 1966). See also S. 3719, 89th Cong. 2d Sess. (1966), introduced by Senator Gore and referred to the Senate Committee on Finance on Aug. 11, 1966, which would make the ABC transaction less profitable, especially outside of the oil and gas industry.
>
> "We simply point to this information as showing some resistance to the extension of the ABC doctrine, not only outside of the mining industry generally, but also outside of the oil and gas industry itself."

and in dollar volume, are very large in amount. While only the Service would know, upon information available to petitioners it seems reasonable to assume that this represents one of the larger areas of ruling by the national office.

It works a major inequity upon a large segment of the American society to apply the general reservation of income principles announced by *Thomas v. Perkins* only to those who have their income producing investments in minerals. As discussed above, this Court has consistently held that income from minerals is treated as operating income, just as is income from other investments. Thus, absent legislation, there is no basic justification for establishing one rule for the recognition of one type of operating income (minerals) and a different rule for another (non-minerals). *Commissioner v. P. G. Lake, Inc., supra.*

Upon the merits, petitioners would show that there is economic justification for applying the *Thomas v. Perkins* reservation of income principle to both minerals and non-minerals. It is, of course, obvious that these principles sometimes work to a taxpayer's disadvantage. *U. S. v. Witte, supra.*

The importance of this issue is that a fundamental general principle of tax law regarding recognition of income should be uniformly applied to operating income from all types of investments.

OPINIONS OF LOWER COURTS

The per curiam opinion of the Fifth Circuit Court of Appeals is appended hereto. (See Appendix)

The opinion of the Tax Court is set out on pages 5 through 24, both inclusive, of the record printed for the use of the court below, nine copies of which are filed herewith under paragraph 4 of Rule 21.

Wherefore, premises considered, petitioners pray that this Court grant this their petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney for petitioners has on this 15 day of Dec, 1967, mailed (by depositing same in the United States mail, with first class postage prepaid) three copies of the foregoing petition addressed to Solicitor General, Department of Justice, Washington, D. C. 20530 and three such copies addressed to Honorable Mitchell Rogovin, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530.

Bob Huff

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APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 24318

LARRY D. HIBLER AND JUANITA HIBLER,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for Review of a Decision of the Tax Court (Texas Case).

(November 2, 1967.)

Before JONES and GODBOLD, Circuit Judges, and SCOTT, District Judge.

PER CURIAM: The facts giving rise to this appeal and the controlling principles of law are set forth in the opinion of the Tax Court. *Hibler v. Commissioner*, 46 T.C. 663. We are in agreement with its decision. The appellant on argument stresses the opinion of this Court in *Moberg v. Commissioner*, 365 F. 2d 337, which was decided too late for consideration by the Tax Court. The facts of the *Moberg* case distinguished it from this case and make inapplicable the rule there announced. The decision of the Tax Court is AFFIRMED.